Supreme Court, U.S.
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Nos. 91-1111, 1128, 1131, & 1146

In The

Supreme Court of the United States

October Term, 1991

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that insurers' enlistment of reinsurers and others in agreements not to trade, as a means of compelling competitors to stop selling certain insurance products to American consumers, are sufficient to state a claim of "boycott, coercion or intimidation" within the meaning of section 3(b) of the McCarran-Ferguson Act.

2. Whether insurers' participation in unregulated, and, therefore, nonexempt, conspiratorial conduct even qualifies for the antitrust exemption provided by section 2(b) of the McCarran-Ferguson Act.

3. Whether, under the state action doctrine, approval of an insurance policy form developed by a trade association results in antitrust immunity for unauthorized and unsupervised marketplace activities to compel competing insurers to use the form and stop selling certain insurance products to American consumers.

4. Whether foreign reinsurers' self-regulation of some aspects of their business should preclude a federal court from exercising jurisdiction over the foreign reinsurers' anticompetitive conduct when (i) that conduct was targeted at American markets; (ii) that conduct had direct, substantial and foreseeable effects on American commerce; and (iii) no relevant regulation, foreign or domestic, compels or authorizes the anticompetitive conduct.

QUESTIONS PRESENTED – Continued

5. Whether American insurance consumers have standing to sue for injunctive relief and damages under the antitrust laws when they suffer antitrust injury to business or property as a result of a restraint of trade in the market in which they purchase insurance.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The other petitions to which this consolidated opposition brief apply are styled:

> Merrett Underwriting Agency Management Limited, et al. v. State of California, et al., No. 91-1128;
>
> Winterthur Reinsurance Corp. of America v. State of California, et al, No. 91-1131; and
>
> Unionamerica Insurance Co. Ltd., et al. v. State of California, et al, No. 91-1146.

Governmental Plaintiffs (Respondents):

State of Alabama
State of Alaska
State of Arizona
State of California
State of Colorado
State of Connecticut
State of Louisiana
State of Maryland
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Montana
State of New Jersey
State of New York
State of Ohio
Commonwealth of Pennsylvania
State of Washington
State of West Virginia
State of Wisconsin
Borough of Chambersburg, Pennsylvania
City of Altoona, Pennsylvania

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

City of Baton Rouge, Louisiana
City of Birmingham, Alabama
City of Clay, West Virginia
City of Eunice, Louisiana
City of Lafayette, California
City of Mobile, Alabama
City of Nachitoches, Louisiana
City of New Orleans, Louisiana
City of San Francisco, California
City of Slidell, Louisiana
City of York, Pennsylvania
County of Cowlitz, Washington
County of Hancock, West Virginia
County of Hardin, Ohio
County of Mineral, West Virginia
County of San Benito, California
County of San Francisco, California
County of Schuylkill, Pennsylvania
County of Teton, Montana
County of Wirt, West Virginia
Roosevelt Island [New York] Operating Authority, Inc.
Town of Hanover, Massachusetts
Town of Milford, Massachusetts
Township of Jackson, Ohio
Village of Lake Success, New York
Village of Groton, New York

Private Plaintiffs (Respondents):

Ace Check Cashing, Inc.
Acme Corrugated Box Company, Inc.
Anastasios Markos, t/a Municipal Exxon
Bay Harbor Park Homeowners' Association, Inc.
Bensalem Township Authority

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Big D Building Supply Corporation
Carlisle Day Care Center, Inc.
Carmella M. "Boots" Liberto, t/a R.J. Liberto, Inc.
Durawood, Inc.
Environmental Aviation Sciences, Inc.
Glabman Paramount Furniture Mfg. Co., Inc.
Henry L. Rosenfeld, t/a Mobile Check Cash
Jerry Grant Chemical Associates, Inc.
Keyboard Communications, Inc.
Kirklington Park, Inc.
Les Ray Bobcat, Inc.
P & J Casting Corp.

Defendants (Petitioners):

Allstate Insurance Company
Aetna Casualty & Surety Company
CIGNA Corporation
Hartford Fire Insurance Company
Insurance Services Office, Inc.
Reinsurance Association of America
Constitution Reinsurance Corporation
General Reinsurance Corporation
Mercantile & General Reinsurance Company of America
North American Reinsurance Company
Prudential Reinsurance Company
Winterthur Swiss Insurance Company
Thomas A. Greene & Company, Inc.
C.J.W. (Underwriting Agencies) Limited
D.P. Mann Underwriting Agency Limited
Edwards & Payne (Underwriting Agencies) Limited
Janson Green Management Limited

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Lambert Brothers (Underwriting Agencies) Limited
Merrett Underwriting Agency Management Limited
Murray Lawrence & Partners
Sturge Reinsurance Management Ltd.
Peter N. Miller
Robin A.G. Jackson
Three Quays Underwriting Management Limited
R.K. Carvill & Company
Unionamerica Insurance Company Ltd.
Continental Reinsurance Corporation (U.K.) Limited
CNA Re (U.K.) Ltd.
Kemper Reinsurance London, Ltd.
Excess Insurance Company, Ltd.
Terra Nova Insurance Company Limited
Ballantyne, McKean & Sullivan Limited

Private plaintiffs do not have any corporate parents or subsidiaries within the meaning of Rule 29.1.

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (UA App. A1-A35)[1] The opinion of the district court is reported at 723 F.Supp. 464 (UA App. A36-A86).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. UA App. A87-A99. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in these petitions are sections 1 and 7 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 6a (Merrett App. A93); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* (Hartford App. 98a- 99a); and sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15(a) & 26 (UA App. A100-A102).

STATEMENT

This case comes to this Court without the development of a factual record, in a posture in which the allegations of the plaintiffs' complaints and the reasonable inferences to be drawn from them must be taken as true.[2]

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[1] Of the four petitions filed with this Court, the appendix to the petition filed in *Unionamerica Insurance Co., Ltd., et al.*, No. 91-1146 is the most complete. Respondents' Consolidated Brief uses that appendix where possible, citing it as "UA App."

[2] *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842, 1845 (1991). Despite its appearance before this Court, this case remains in

(Continued on following page)

Plaintiffs' allegations are reviewed by the Court of Appeals at 938 F.2d at 922-924 (UA App. A13-A18).

At its core, this case is about the enlistment of "reinsurers to compel capitulation" to the demands of a handful of firms. 938 F.2d at 929, UA App. A26. The goal of these firms was to limit the scope of insurance products sold in the United States. *Id.* More specifically, the complaints allege as follows.

In 1984, defendant primary insurers were dissatisfied with the breadth of risks covered by commercial general liability insurance policies.[3] They wanted to shrink the coverage offered in the market, but could not unilaterally cease offering the broader coverages without risking the loss of market share to competitors who remained willing to sell the broader coverage. *See, e.g.*, Conn. Cmpt. ¶¶ 65-67, UA App. A175.

Consequently, the primary insurer defendants, and the domestic and foreign reinsurers they enlisted, conspired to force unwilling competitors to stop insuring certain risks.[4] Collectively, they withdrew necessary inputs required by competing primary insurers who wanted to continue writing these risks. They agreed to withhold reinsurance from U.S. primary insurers who

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its infancy, having been confined by the trial court to motions designed to test the legal sufficiency of the pleadings. Pre-Trial Order No. 2, ¶ 3. The trial court allowed discovery "insofar as necessary for these motions" (UA App. 38, n. 2), but expressly limited that discovery to matters not likely to raise disputed issues of fact. Pre-Trial Order No. 2, ¶ 5. As a result, no discovery was conducted.

[3] Commercial general liability (CGL) insurance provides coverage against third party claims for businesses and state and local governments.

[4] For example, defendants sought to exclude all pollution coverage.

were unwilling to comply with the conspirators' demands. Without reinsurance, a critical input, the capacity of primary companies to offer coverage to their customers would be drastically eroded. Thereafter, defendant Insurance Services Office, Inc. (ISO), the trade association of primary insurers, withdrew statistical support for the risks.[5] *See, e.g.*, Cal. Cmpt. ¶¶ 63-100, UA App. A123-131.

To achieve the full goals of the conspiracy, defendants also moved to limit excess and umbrella coverage as well as property insurance coverage, to conform to changes effectuated in CGL coverages. By these coordinated steps, defendants were largely able to compel competing insurers to stop selling insurance written on policy forms that would have provided the broader coverage, and to use exclusively the lesser forms which the conspirators forced upon ISO.[6] *See, e.g.*, Cal. Cmpt. ¶¶ 101-110, UA App. A131-133.

No state insurance regulator reviewed or approved the coercive conduct that generated these lesser forms. No state insurance regulator reviewed or approved the conduct that forced the use of these forms in the marketplace. 938 F.2d at 931, UA App. A29.

As the complaints allege, the United States argued[7], and the court of appeals found, this case is about

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[5] Statistical support provides information that insurers need to price an insurance product.

[6] No state's approval of the conspirators' new policy forms constituted disapproval of older forms. Absent the conspiracy, all forms would have remained available for use in the marketplace.

[7] The United States filed a brief as *amicus curiae* in the court of appeals. In its brief, the United States argued that (i)

(Continued on following page)

agreements by a few primary insurers and reinsurers to replace existing insurance products with a lesser quality product, and the enforcement acts taken by defendants to compel the market success of the lesser product. Defendants' enforcement acts, most notably the withholding of necessary reinsurance and statistical support services, are central to this case. Defendants used these economic weapons to force unwilling firms to stop offering higher quality insurance products to American consumers.

MISSTATEMENTS IN THE PETITIONS.

The petitions contain numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, plaintiffs note the following major misstatements in the petitions:

1. The Hartford petition describes this case as involving "nothing more" than "agreements among" insurers and reinsurers "over coverage risks they were willing to accept". Hartford Ptn. 2. This case, however, involves "much more." 938 F.2d at 929, UA App. A25. The complaints expressly allege that primary insurer defendants met with reinsurers to formulate and set in a motion a joint strategy to eliminate specific coverages from the market. *See*, e.g., Conn. Cmpt. ¶¶ 68, 69, 73, UA App. A175-A177. The complaints also allege that, in furtherance of this goal, reinsurers "threaten[ed] to withhold

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the complaints allege conduct constituting boycott, coercion or intimidation under the McCarran-Ferguson Act; (ii) the state action doctrine does not prohibit antitrust scrutiny of the alleged boycotts; and (iii) principles of international comity do not preclude judicial review of these cases. The decision of the Court of Appeals is in accord with these arguments.

reinsurance from the market for primary companies" that persisted in offering this coverage (Cal. Cmpt. ¶ 71, UA App. A124); reinsurers "threatened a boycott of North American CGL risks unless" the coverages were eliminated (Cal. Cmpt. ¶ 74, UA App. A125); reinsurers collectively refused to cover certain risks (Cal. Cmpt. ¶¶ 95 & 108, UA App. A130 & A133); and ISO withdrew support services for coverages that included these risks. Conn. Cmpt. ¶ 103, UA App. A183-A184; *See also* Conn. Cmpt. ¶ 116-117, UA App. A186-A187; 938 F.2d at 929, UA App. A25. The Winterthur petition even concedes that plaintiffs alleged that primary insurers "induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms." Winterthur Ptn. 3.

2. The Hartford petition asserts that states sanctioned the defendants' activities because "state law authorized collective forms development". Hartford Ptn. 27. States, however specifically prohibit boycotts, which is the conduct at issue in these cases. *See e.g.*, Md. Ann. Code Art. 48A, § 220 (1986); N.J. Stat. Ann. 17:29B-4(4) (1985); *See also* UA App. A61. As the Ninth Circuit found, the challenged conduct "was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." 938 F.2d at 931, UA App. A30.

3. The Hartford petition asserts that "state agencies made substantive determinations of conformity with state policy." Hartford Ptn. 28. The regulators reviewed forms, not market conduct. As the court of appeals found, nothing in the evidence shows that the relevant states supervised or approved the boycotts used to produce agreement on the content or use of the forms. 938 F.2d at 931, UA App. A29.

4. The Hartford petition asserts that insurance and reinsurance markets are so intimately entwined that state regulation of primary insurers is *de facto* regulation of

reinsurers. Hartford Ptn. 15. The Winterthur petition, on the other hand, states that it "strains credulity" to suggest that activities in one market, including boycotts, affect any other market. Winterthur Ptn. 19-20.

5. The Merrett and Unionamerica petitions state that the Ninth Circuit "dismissed" the global conspiracy claim in the Connecticut-style complaints. Merrett Ptn. 4, n. 2; Unionamerica Ptn. 6-7, n. 6. The Ninth Circuit found this count "consistent" with its opinion and mandated that "[o]n remand to the district court, plaintiffs should be afforded the opportunity to amend" to cure a technical pleading defect. 938 F.2d at 931, UA App. A30.

REASONS FOR DENYING THE WRIT

The court of appeals decision does not warrant review. Defendants' real challenge is not to the legal standards applied by the court of appeals. Rather, defendants contest the court of appeals' construction of the facts of these cases as alleged in plaintiffs' complaints. Still seeking to mischaracterize those allegations, defendants seek certiorari on questions not presented by this case.

In resolving the questions actually presented by plaintiffs' allegations, the decision below is faithful to this Court's prior interpretations of the McCarran-Ferguson Act and the state action doctrine. The decision also accords with this Court's articulated principles of international comity and standing. It accords as well with the decisions of other circuits.

In no respect does the case present questions of exceptional legal and practical importance. Defendants cannot seriously contend that the egregious conduct described in plaintiffs' complaints must be countenanced to assure the survival of the insurance industry. No basis for certiorari has been presented.

The decision below concerned motions brought under Federal Rules of Civil Procedure 12(b) and 56 to "test the validity of . . . critical allegations in the complaint[s]." RT at 21 (June 23, 1988). No discovery was conducted in advance of these motions. Nevertheless, at this early stage of the litigation, defendants continue to press a view of the case that differs categorically from the view of plaintiffs. Disputes over case characterization provide no basis for certiorari. Defendants have stated no reasonable basis for review of the decision of the court of appeals and, on the limited factual record before this Court, there is no basis for review.

I. THIS CASE PRESENTS NO OPPORTUNITY TO CLARIFY THE REACHES OF THE MCCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act "embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979). In striking a balance between competition and regulation, the Act exempts from antitrust scrutiny conduct that is the business of insurance and is regulated by the state. 15 U.S.C. § 1012 (b). Otherwise qualified conduct is denied this exemption, however, if it constitutes an agreement or act of boycott, coercion or intimidation. 15 U.S.C. § 1013 (b). These cases allege boycott, coercion and intimidation. Further, these cases allege participation by domestic insurers in unregulated foreign reinsurance activity – conduct that does not even qualify for the McCarran exemption in the first instance. Delicate questions of balance do not arise. The antitrust laws apply.

The court of appeals' holdings on the McCarran-Ferguson Act defenses are unsuited to review by this Court. They present numerous issues, each of which this

Court would need to resolve in defendants' favor before the outcome of these cases would change. Defendants have asked this Court to reject the court of appeals' reading of the complaints; to reverse the court of appeals' opinion that the challenged conduct is a boycott under the McCarran Act; and to reverse the court of appeals' conclusion that the McCarran Act does not shield conspirators' participation in nonexempt conduct. These issues are fact-bound. Moreover, each was resolved below based on conventional applications of legal principles established by this Court.

A. Defendants' petition for certiorari asks this Court to reject the definition of boycott expressed in *St. Paul Fire & Marine Insurance Co. v. Barry*, and used by this Court throughout its history.

The court of appeals observed the clear line between conduct constituting an actionable boycott and conduct constituting permissible joint activity. It correctly found, 938 F2d 929; UA App. A27, as the United States had urged in its *amicus curiae* brief at 16, that the conduct alleged in this case falls well on the boycott side of the distinguishing line.

The court of appeals' decision rested squarely on *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court's explanation of the boycott exception in the McCarran-Ferguson Act. In *Barry*, this Court surveyed the long line of Supreme Court precedent giving rise to a "common understanding" of the term boycott. *Barry*, 438 U.S. at 541-45. The court of appeals found that the plaintiffs' allegations fit "exactly" within this common understanding. 938 F.2d at 929, UA App. A26. In its brief *amicus curiae*, the United States had urged that result, commenting that

> the combination of primary insurers and reinsurers alleged by plaintiffs falls well within the 'common understanding' (*Barry*, 438 U.S. at 552) of boycott, coercion or intimidation. Indeed, it is precisely the kind of conduct characterized as a boycott, coercion and intimidation in the Sherman Act case that led to the passage of the McCarran-Ferguson Act and with which Congress was specifically concerned when it included [the boycott exclusion in the McCarran-Ferguson Act].

Brief for the United States as *amicus curiae*, filed below, at 16.[8]

Defendants, however, attempt to manufacture a controversy from the colloquy between the majority and dissent in *Barry*. Yet, the majority and dissent in *Barry* would agree that the facts presented here constitute a

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[8] The legislative history of the McCarran-Ferguson Act demonstrates that Congress carefully distinguished voluntary agreements among insurers on policy terms – which could claim antitrust immunity if regulated by the state – from combinations designed to force unwilling competitors to adhere to terms through the concerted denial of necessary trade relationships – which were expressly denied immunity. *Barry*, 438 U.S. at 547-50. Indeed, the Act recognizes that "the vice in the industry was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies." *Barry*, 438 U.S. at 548, quoting Senator O'Mahoney. Senator O'Mahoney describes as "absolutely" unprotected "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which is attempting to do business in the insurance field in any way that was disapproved by them. . . . " 91 Cong. Rec. 1480 (1945) (Statement of Senator O'Mahoney). The central allegations of the complaints concern these kinds of prohibited agreements.

boycott. The majority in *Barry* described a boycott as "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation of the boycotted group. . . . " *Barry*, 438 U.S. at 544-45. The dissent in *Barry* chose different words, but approved the same concept, concluding that *McCarran* boycotts concern "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565.

Thus, the *Barry* majority and minority agree on a bright line test. Whatever else a McCarran boycott may be, it indisputably includes what is alleged here: agreements and acts to withhold an essential input from other insurers as means of forcing their acquiescence. The court of appeals' application of *Barry* was conventional and correct.

Grasping at straws, defendants claim that a McCarran-Ferguson boycott does not exist unless "competing insurance companies [are] absolutely excluded from the market" or there is a "total refusal to deal on any terms". Hartford Ptn. 24. This Court has never required such a finding. Indeed, the case that served as the model for the boycott exception in the McCarran-Ferguson Act, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 535 (1944), involved neither situation.

South-Eastern Underwriters involved a conditional refusal to deal.[9] The facts of *South-Eastern Underwriters* are markedly similar to those involved here. Both cases

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[9] So-called "conditional" refusals are classic boycotts. *E.g., Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). These boycotts are not designed to drive competitors from the market. Rather, they are designed to force unwilling competitors to adhere to particular terms of trade.

concern conspirators who refused to deal in order to force unwilling competitors to acquiesce to their terms. In both, reinsurance was withdrawn as the means of forcing acquiescence. Both allege conduct falling well within the common understanding of boycott.

Defendants refer to a "debate" in which some lower courts attempt to distinguish between refusals to deal on any terms (absolute refusals) and refusals to deal on some terms (partial refusals). They would classify only the former as a boycott. This debate is not pertinent here because it only concerns consumer boycotts.[10] The present case does not allege consumer boycotts. It alleges concerted refusals to deal to force competitors to adopt conspirators' trade restrictions.[11]

Some lower courts may seek to confirm that a particular consumer boycott is coercive by inquiring into the absolute or partial nature of the refusal to deal. However, a boycott to force a competitor to adhere to trade terms dictated by conspirators is by definition coercive.[12] Thus,

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[10] The cases cited by defendants as holding that an absolute refusal to deal is essential are consumer boycott cases. *See Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F. 2d 890 (3d Cir.), *cert. den.*, 464 U.S. 938 (1983) and *UNR Industries Inc. v. Continental Ins. Co.*, 607 F. Supp. 855 (N.D. Ill. 1984).

[11] Defendants' citation to 9 E. Kintner & J. Bauer, *Federal Antitrust Law* 245 (1989) is, thus, curious. Kintner & Bauer distinguish consumer boycott cases from those where "a partial or conditional refusal to deal . . . is designed to coerce the target to conform to certain conduct." In the latter situation, Kintner & Bauer note the lack of conflict among lower courts, citing the overwhelming majority of cases holding that an absolute refusal to deal is not required. *Id.* at 245-46.

[12] Contrary to defendants' assertions, this case is not about ordinary course-of-business arrangements against which

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courts confronting boycotts against competitors have not used, and need not use, the elusive distinction between partial and absolute refusals to deal to corroborate coercion.

Decided well within the contours of the "common understanding" of boycott, this case simply presents no opportunity for this Court to test the reaches of its definition of boycott under the McCarran-Ferguson Act.

B. Defendants' exemption forfeiture arguments actually seek to expand the scope of the limited antitrust exemption established by the McCarran-Ferguson Act.

As an additional and independent ground for denying McCarran-Ferguson protection to the defendants' conduct, the court of appeals held that the Act's protection did not extend to the domestic defendants' participation in unregulated agreements with the foreign defendants.[13] Relying on *Beltz Travel Service v. International Air Transport Assn.*, 620 F.2d 1360 (9th Cir. 1980), the

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other insurers found it difficult or expensive to compete. This case is about one group of competitors (defendant primary insurers) seeking to discipline another group of competitors (the unwilling primary insurers) by inducing suppliers (reinsurers and ISO) not to provide necessary supplies (reinsurance and statistical support) unless the unwilling primary insurers acceded to the trade terms of the defendant primary insurers. Thus, there is no necessity in this case to distinguish between "economic exigencies" that flow from the need to respond to protected horizontal agreements and "coercion." The facts as alleged are well within the traditional concept of a boycott.

[13] Petitioners do not challenge the court of appeals' holding that the conduct of the foreign reinsurers fails to qualify for the McCarran exemption because it is not regulated by the states.

court of appeals found an "exemption forfeiture" as a result of domestic insurers' joining in the unregulated (and therefore non-exempt) conduct of foreign reinsurers.

In its holding, the court of appeals applied well-accepted principles. First, "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979).[14] Second, there is nothing novel about holding an otherwise exempt entity liable when it conspires in non-exempt conduct. For example, in the labor exemption context, this Court has stated:

> A union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. . . . But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy.*

Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965) *quoted in Royal Drug*, 440 U.S. at 232, n.39 (emphasis added).[15]

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[14] *See, e.g., Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975); *FMC Corp. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

[15] Defendants claim that the court of appeals exemption forfeiture decision is contrary to *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Hartford Ptn. 16. However, there is

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The record as it currently stands provides no basis for a reconsideration of these long-standing principles. The line between exempt and non-exempt conduct can best be drawn on a well developed factual record, and not on the bare allegations of even a well-pleaded complaint.

Moreover, defendants' exemption forfeiture argument would expand the limited exemption established by the McCarran-Ferguson Act. There is no legal justification for doing so.

The present record fails to indicate in anyway that the insurance industry will become less efficient if this Court fails to expand the McCarran exemption to include insurer conspiracies involving unregulated foreign reinsurance activity. The unavailability of the McCarran

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nothing in *Pireno* that is inconsistent with the decision below. In *Pireno*, this Court considered the factors for determining what is the "business of insurance" under the McCarran Act, and noted that involvement of non-insurance companies in challenged conduct does not necessarily disqualify conduct from being characterized as the "business of insurance." This discussion is not relevant to the present cases, however, because the exemption forfeiture analysis of the court of appeals rested on the "state regulation" prong of the McCarran Act, and not on "the business of insurance" requirement. In short, the court of appeals' unchallenged finding is that the foreign reinsurers' conduct fails to qualify for the McCarran exemption because it is not state regulated. 15 U.S.C. § 1012(b). In finding that the domestic insurers also had no McCarran exemption, the court of appeals below followed this Court's precedent making all conspirators liable for the unlawful acts of their co-conspirators. *See, e.g., Mine Workers v. Pennington*, 381 U.S. at 665-66; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1948).

exemption does not automatically impose antitrust liability on insurers for joint conduct with foreign reinsurers. If an insurer has no exemption with respect to certain conduct, that conduct simply becomes subject to antitrust scrutiny, not necessarily antitrust liability.[16]

Moreover, most companies have no trouble discerning the difference between lawful agreements regarding the supply of important inputs and unlawful agreements to deny competitors such inputs unless the competitors accept particular terms of doing business. The court of appeals' decision leaves insurers free to purchase reinsurance but properly warns them against using such arrangements as exclusionary devices directed against competitors.

The insurance industry ought not be surprised or confused by the court of appeals' ruling. Reinsurers have long regarded themselves as being without antitrust exemption, and have generally conducted their business accordingly.[17] Certainly, primary insurers cannot claim to

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[16] Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product. Neither transaction is ordinarily an antitrust violation.

[17] N. David Thompson, president and chief executive officer of Defendant North American Re, expressed this view in *Forum*, a publication of the American Bar Association:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as

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be hamstrung in their ordinary operations because the court in this case followed settled law and refused to expand an antitrust exemption to include the egregious conduct alleged in the complaints. The McCarran-Ferguson Act has never protected the conduct challenged in these complaints.

II. THE DECISION BELOW RESTS ON A CONVENTIONAL APPLICATION OF THE STATE ACTION DOCTRINE.

This Court has repeatedly held that the state action doctrine immunizes the conduct of private persons from antitrust scrutiny only when that conduct is: (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the State. *California Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). This two-pronged test assures that the challenged anticompetitive conduct is that of the State itself. *Patrick v. Burget*, 486 U.S. 94 (1988). Contrary to defendants' assertion that the court of appeals did not apply "the *Midcal* criteria," Hartford Ptn. 9, the court faithfully applied these criteria. Defendants simply failed to meet the requirement of either prong of the test.

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> the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protection of the McCarran Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981).

First, defendants' conduct was not authorized by any state policy. Indeed, state unfair insurance practices laws expressly prohibit boycotts. See, e.g., Md. Ann. Code Art. 48A, § 220 (1986). N.J. Stat. Ann. 17:29B-4(4) (1985). Second, as the court of appeals found, there is nothing in the record to demonstrate that states supervised or approved the boycotts alleged. 938 F.2d at 931, UA App. A29. Moreover, because some of the anticompetitive acts occurred *after* the approval of policy forms, supervision was impossible.[18] This case presents no issue as to either prong of *Midcal*, and, therefore, no basis for certiorari.

Defendants argue that if states have a clearly articulated policy of permitting joint forms development, then they implicitly have a clearly articulated policy permitting all behind-the-scenes coercive activity that might conceivably be related to the creation and use of a particular form. This argument would expand the state action doctrine to immunize agreements denying competitors access to essential inputs, and the boycotts implementing those agreements, even absent any evidence of public authorization, approval or supervision of the agreements and boycotts. Such an expansion of the state action doctrine would be completely at odds with the decisions of this Court.

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court summarily rejected the defendants' approach. There, four medical malpractice insurance companies agreed that three would not sell insurance to doctors in Rhode Island in order to force

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[18] For example, a key boycott allegation of the complaints is the withdrawal of support for competing ISO forms. Conn. Cmpt. ¶¶ 101-104, UA App. A183-A184; *See also* Cal. Cmpt. ¶¶ 97-100, UA App. A131. As defendants admit, this was not accomplished until "more than a year after the approved 1986 forms had become effective." Hartford Ptn. 6.

them to accept new coverage terms set by St. Paul, the fourth insurer. There, as here, defendants had filed forms with state insurance regulators related to the boycotted coverages. Nevertheless, this Court found no suggestion that the State had authorized the concerted refusals to deal with St. Paul's policyholders. *Barry*, 438 U.S. at 554, n. 26.

The court of appeals adopted the same reasonable distinction in the present case. Approval of policy forms is not approval of market boycotts. The conduct of defendants in these cases "was neither a reasonable nor necessary consequence of the conduct regulated by the state." 938 F.2d at 931, UA App. A30. Defendants simply fail to meet either prong of the *Midcal* test. No further review is warranted.

Because the facts of this case are so unaccommodating, defendants seek to recast them as mere forms development. Operating within this distorted construct, defendants focus on the process by which ISO drafts and obtains approval for insurance forms. But, contrary to defendants' characterization, this case alleges marketplace activities directed at an insurers' individual decision what coverage to offer.

Review is also inappropriate on the present undeveloped record. In support of their summary judgment motion, defendants relied upon the affidavit of Carole Banfield.[19] The Banfield affidavit merely asserts that reinsurers expressed their views on proposed coverages.[20]

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[19] Defendants also submitted an appendix of state insurance statutes.

[20] At its most forceful, the affidavit states:

> ISO and the insurance regulators also discussed the proposed new forms with other interested parties, including insurers, agents, brokers, domestic

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Nothing in this affidavit, or anywhere else in the record, suggests that the various agreements and their attendant boycotts were ever submitted for regulatory review and approval in any of the states subject to the state action motion. 938 F.2d at 931, UA App. A29. Nothing in this affidavit or anywhere else in the record supports a finding that any state regulator actively supervised these activities.

Contrary to defendants' hyperbole, the decision of the court of appeals will not create a crisis in federalism. Nowhere do the complaints attack or even question the regulatory acts of state officials. Accordingly, defendants' invocation of this Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991), is misplaced.

What plaintiffs do challenge are back-room deals, unknown and unapproved by regulators, to force unwilling companies to toe a line drawn by a handful of powerful firms. Open comment and debate are not at issue in these cases. If these boycotts are immune from antitrust scrutiny simply because state regulators see some public manifestation of the boycott, private regulation of the insurance industry by a few firms will supplant public regulation. By deterring these boycotts and forcing full and fair use of state regulatory processes, the court of appeals acted to strengthen state regulation, not to supplant it.

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> and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. Banfield Afft. ¶ 9 at 5.

III. THE DECISION TO EXERCISE JURISDICTION IN THIS CASE PROPERLY APPLIES SETTLED PRINCIPLES OF INTERNATIONAL COMITY.

A. This Case Provides No Occasion to Refine the General Principle Favoring the Exercise of Jurisdiction Where American Effects are Direct, Substantial and Foreseeable.

As a general principle, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990).[21] This strong presumption in favor of the exercise of jurisdiction may nonetheless be overcome and principles of comity may come into play where the interests of, and links to, the United States are attenuated. *Timberlane I*, 549 F.2d 613. *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984). Such is not the case here. The anticompetitive effects of the defendants' conduct in the United States

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[21] Although *Kirkpatrick* is an act of state case, its powerful logic applies to this case as well. Moreover, its analysis stems from the same roots as the comity doctrine. *Compare* Restatement (Third) of Foreign Relations 443, comment a [The act of state doctrine has two policy bases: "deference to the executive branch and avoid[ing] disrespect for foreign states"] *with Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976) (*Timberlane I*), *after remand*, 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985) ["Only respect for the role of the executive and for international notions of comity and fairness limit [the] constitutional grant" of power that enables American courts to protect Americans from foreign actions that have anticompetitive effects in the United States].

were direct, substantial and foreseeable[22]; the action of the foreign government creates no true conflict with American antitrust laws.

The lower courts have had occasion to articulate when principles of international comity require abstention from the exercise of jurisdiction.[23] *Timberlane, supra; Laker Airways, Ltd., supra; Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). These articulations derive from the venerable *Alcoa* "effects" test. *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945) (sitting by certification of this Court).[24] The minor variations in these articulations are of no moment in the present case.[25] To the contrary, a court

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[22] As both courts below found, the complaints explicitly allege conduct with a "direct, substantial and reasonably foreseeable" impact on American commerce. 723 F.Supp. at 486, UA App. A73; 938 F.2d at 932, UA App. A31.

[23] *Kirkpatrick* cautions against treating such principles as "doctrines unto themselves" and thereby "expanding judicial incapacities." 493 U.S. at 409.

[24] Under *Alcoa*, "a state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Alcoa*, 148 F.2d at 443. The conduct should, however, "significantly" or "directly" affect the United States commerce or be intended to have that effect. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 705 (1962).

[25] Defendants argue that the court of appeals' *Timberlane* analysis was wrongly "constrained" by reference to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. This misstates the use to which the court of appeals put the FTAIA. Indeed, it simply concluded that its *Timberlane* analysis should be informed, but not superseded, by the "direct, substantial and foreseeable effect" standard articulated in the FTAIA. 938 F.2d at 932; UA App. A31. Thus, the

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would exercise jurisdiction over the facts of this case under any recognized comity test.[26]

The conduct challenged in this case has its principal effects in the United States. The complaints allege a complex and overlapping pattern of conspiratorial activity engaged in by both foreign and domestic actors that targeted United States markets. Initially conceived by the American domestic primary insurer defendants, the conspiratorial scheme sought to limit the number of insurance products offered to insurance consumers in the United States. Foreign and domestic reinsurers were recruited as parties necessary to guarantee that unwilling American competitors would comply with the scheme.

The integral involvement of domestic companies in the scheme to withhold reinsurance belies any notion that such activity was "wholly foreign." 938 F.2d at 932, UA App. A33. Only by ignoring the overarching American focus of the complaints can defendants represent that their motion to dismiss on comity grounds involves solely British actors in British markets. Merrett Ptn. 3-4.[27]

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court of appeals concluded: "as the [FTAIA] does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play." *Id.*, UA App. A32. This is precisely what the court of appeals did here.

[26] The *Timberlane* balancing test employed by the court of appeals is the one most favorable to defendants. Defendants, notably, do not claim that any other circuit court of appeals would have reached a different result.

[27] The so-called "global claim" for relief in the complaints of many plaintiffs explicitly alleges that all defendants participated in a single, overarching conspiracy. Conn. Cmpt. ¶¶ 115-119, UA App. A188-A190. While the court of appeals

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Moreover, the complaints expressly allege that foreign and domestic reinsurers entered into a written agreement to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987, will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." Conn. Cmpt. ¶ 112, UA App. A185-A186; Cal. Cmpt. ¶ 108, UA App. A133. This clear focus on American commerce justifies the decision of the court of appeals to exercise jurisdiction.[28]

At the very most, defendants have only raised factual disputes as to whether the conspirators were exclusively foreign nationals and whether the relevant anticompetitive conduct occurred exclusively abroad.[29] Jurisdiction

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recognized that the trial court had properly dismissed that claim on a narrow technicality of pleading, it directed the trial court on remand to allow plaintiffs an opportunity to cure that deficiency by amendment. 938 F.2d at 931, UA App. A30. Defendants' claim that those allegations were simply dismissed, Merrett Ptn. 4, n. 2, is misleading.

[28] Urging that jurisdiction be exercised, the United States as *amicus curiae* below commented that "[i]nternational comity principles do not mandate automatic deference to the domestic law or jurisdiction objections of foreign states . . . where the conduct challenged has its competitive effects principally in the United States." Brief for the United States of America as *Amicus Curiae*, at 27. In fact, the United States contended that the district court "failed to accord adequate weight to the fact that the competitive effects of the alleged conspiracy were felt primarily within the United States or to the resulting interest of the United States in enforcing its law." *Id.*

[29] No discovery preceded this Rule 12(b)(1) motion and there is no factual record beyond the face of the complaints

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should not be denied on the mere assertion of these factual disputes.

B. No Genuine Conflict Exists Between United States and United Kingdom Law.

In an attempt to counterbalance the compelling reasons for the exercise of jurisdiction, defendants claim that the British "tradition of self-regulation" creates an international conflict of sufficient scope to warrant denying jurisdiction in these cases. Defendants do not suggest that British law requires the foreign defendants to take actions forbidden by American law, that British law forbids what American law requires, nor even that compliance with American antitrust law would substantially interfere with the foreign defendants' mode of conducting business at home and within the European economic community. Merrett Ptn. 6, n. 4. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome, governing competitive practices in the EEC.[30]

The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts and

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that can be evaluated to conduct comity analysis. See *Timberlane I* and *Timberlane II, supra* (decided only after substantial discovery and on a full factual record).

[30] Defendants do not here, nor did they below, cite any statute, regulation or court decision to show that English law requires, or even acquiesces in, the conduct challenged by plaintiffs.

interfering with a British tradition of self regulation.[31] The conflict asserted is manifestly insufficient to overcome the interest of the United States in enforcing its own law.

IV. PLAINTIFFS HAVE STANDING AS CONSUMERS IN THE MARKET RESTRAINED BY THE REINSURER BOYCOTTS.

Reinsurers have filed two separate petitions[32] arguing that plaintiffs lack standing to pursue certain claims against them. Both petitions are based upon a fundamental mischaracterization of plaintiffs' complaints. To obscure plaintiffs' unquestionable standing as consumers in the market restrained by reinsurer boycotts, the petitions focus attention on activities in the reinsurance market. Plaintiffs' complaints plainly allege, however, that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers. Cal. Cmpt. ¶¶ 112, 117, 122 & 127, UA App. A134, A136, A137, A139; Conn. Cmpt. ¶¶ 116 & 121, UA App. A186 & A188. The

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[31] Defendants have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country. If the two-pronged *Midcal* test were applied to the conduct of foreign defendants, no immunity would attach. The boycott conduct at issue here is neither permitted by British law, Pet. at 6, n.4, nor actively supervised by the British government.

[32] These are: 1. Docket No. 91-1131 (Winterthur Reinsurance Corp of America); and 2. Docket No. 91-1146 (Unionamerica Insurance Co. Ltd. et al.).

plaintiffs, thus, have standing as consumers that have been injured by the elimination of competing insurance products in this market.[33]

A. Plaintiffs Meet This Court's Test for Standing.

These petitions do not warrant review by this Court because the court of appeals decided the standing issues in these cases strictly in accordance with this Court's decisions in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

AGC involved a boycott allegedly organized by building contractors to coerce prospective developers to use nonunion contractors instead of union contractors. This Court acknowledged that both the developers and the union contractors would have had standing to challenge the boycott because "their injuries would be direct." 459 U.S. at 541.[34]

Thus, *AGC* established that those upon whom the immediate pressure of a boycott falls (developers) and

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[33] Regardless of their standing as insurance purchasers, the state plaintiffs also have standing to seek injunctive relief as common law *parens patriae* on behalf of their respective citizens. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1944). Because citizens in each state have suffered antitrust injury, even as defined by defendants in their standing petitions, nothing in this Court's opinion in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), would limit the states' *parens* authority in these cases. See *California v. American Stores Co., Inc.*, 495 U.S. 271 (1990).

[34] However, the mere employees of these victims (or the union which represents them, the plaintiff in *AGC*) would not have standing.

their suppliers (union contractors) whose goods or services have been diminished in value because of the boycott each have standing to recover antitrust damages.

This principle is fully consistent with the Court's prior decision in *McCready*. There, both the psychologists who felt the immediate pressure of a boycott and the patients who purchased the boycotted product, psychological services, had standing to sue. *McCready*, 457 U.S. at 469 n.4, 478-81. In *McCready*, the patient was considered "the direct victim of unlawful coercion." *AGC*, 459 U.S. at 540, n.44. Indeed, to the extent that there might be a difference between suppliers to the direct boycott victim (the union contractors in *AGC*) and purchasers from the direct boycott victim (the patient in *McCready*), the courts have tended to favor the latter. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.1d (1991 Supp.).

In the instant case the initial victims of the boycott are non-defendant primary insurers who were coerced by reinsurer and primary insurer defendants. Plaintiffs are purchasers of the diminished insurance products sold by the defendant primary insurers and their victims, competing, non-defendant primary insurers. Plaintiffs, thus, are in the same position as the patient in *McCready* and are in an analogous position to the union contractors in *AGC*.

B. This Case Does Not Challenge the Boundaries of Standing Doctrine.

In *AGC* this Court established a multi-factor test for standing.[35] As to the claims for damages, each petition

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[35] The *AGC* factors are: the intent of the conspirators (459 U.S. at 537); the causal connection between the violation alleged and harm claimed (*id.*); the nature of plaintiffs' injury,

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advocates a different formulation of that test. Review is not warranted, however, because plaintiffs have standing under either formulation for both damages and injunctive relief.[36]

The Winterthur petition argues that plaintiffs must satisfy all of the *AGC* factors to have standing. The decision below correctly holds that plaintiffs satisfy each factor for all claims. The court of appeals noted that the "character-of-damages" factor as applied to the reinsurer-only claims presented some problems of damage allocation tending against standing for these claims. However, even as to that factor the court of appeals held that, on balance, the factor "is in favor of standing." 938 F.2d at 926, UA App. A20.

Furthermore, the global conspiracy claim[37] overcomes any "character-of-damages" concerns. Under the

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i.e., antitrust injury (*id.* at 538); the directness or indirectness of the claimed injury in the chain of causation (*id.* at 540-541); existence of a better class of plaintiffs (*id.* at 542); and whether the damages claimed are either speculative in terms of causation or duplicative (*id.* at 542-545).

[36] *Cargill* recognizes important differences between damages and injunctive remedies and holds that "some" *AGC* factors "are not relevant under § 16," i.e. factors addressing multiple lawsuits and duplicative recoveries. *Cargill*, 479 U.S. at 111 n.6.

[37] The Unionamerica petition does not challenge plaintiffs' standing under the global conspiracy claim, but misleadingly refers to it as "dismissed." UA Ptn. 6-7, n.6. The court of appeals granted plaintiffs leave to amend that claim to cure technical problems. See n.27, *supra*. The Winterthur petition concedes the continued vitality of the claim, but apparently contends that the Court should ignore direct purchases from coconspirators and deny standing. Winterthur Ptn. 20 n.8.

global claim, the reinsurers are coconspirators of the defendant primary insurers from which plaintiffs made direct purchases. *See Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). When a plaintiff purchases directly from a named coconspirator of an antitrust violator, none of the policy concerns of *Illinois Brick*[38] are implicated. P. Areeda & H. Hovenkamp, *Antitrust Law* § 337.2e (1991 Supp.). Any issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation. In light of plaintiffs' standing to sue defendants under the global claim, a fragmented review of the reinsurance-only claims would be premature and potentially futile.

The Unionamerica petition argues that "directness" and "the nature of the injury" are separate and independent limitations on standing. Because the court of appeals correctly held that plaintiffs satisfied both requirements, consideration of this question should await a case in which one of the two elements, and, therefore, the outcome of the case, is in doubt.

C. Plaintiffs Suffered Distinct Injuries.

Defendants' suggestion that the damages sought by the plaintiffs in these cases are either speculative or duplicative is simply without merit. The speculativeness referred to in *AGC* only relates to causation of injury and not to its quantification. *AGC*, 459 U.S. at 542 ("the

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[38] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

alleged effects on the Union may have been produced by independent factors").

The danger of duplicative recoveries does not exist here. This is not a passing-on case where there will be "conflicting claims to a common fund," *id.* at 544, that might give rise to concerns similar to those in *Illinois Brick Co. v. Illinois*, 431 U.S. ~~720 (1977).~~ The boycotts in these cases give rise to two types of injury that are suffered by distinct and different classes of potential plaintiffs. The plaintiffs currently before the Court were injured by the product output restrictions and the overcharges that flowed from the violation. The competing, non-defendant primary insurers were injured by the enforcement effects of defendants' cartel. Each class of potential plaintiffs suffered distinct and separable injuries. Indeed, this Court's decisions in both *AGC* and *McCready* expressly recognized the separate standing of different classes of plaintiffs for each of these types of injuries.

No court has ever held that it would be duplicative to allow standing for the victims of violations which also cause actionable injury to defendants' competitors. Such a holding would limit standing to competitors in a wide variety of cases. Such a holding would, for example, deny standing to consumers who pay the overcharges imposed by a monopolist that unlawfully excludes competitors from the market.

Defendants have not offered this Court any principled basis for denying standing to the consumers of cartellized insurance products in this case. Thus, they have not provided any basis for review of the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

DATED this 14th day of February, 1992

Respectfully submitted,

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